

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TAM TRAN ARBOR	:	DETERMINATION
	:	DTA NO. 818801
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period March 1, 1998 through May 31, 2000.	:	

Petitioner, Tam Tran Arbor, 30 Downing Street, New York, New York 10014, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1998 through May 31, 2000.

A small claims hearing was held before Brian L. Friedman, Presiding Officer, at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York on May 7, 2003 at 1:15 P.M. Petitioner appeared by Kayser & Redfern, LLP (Declan Redfern, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Gale Elliott).

The last brief was due on July 21, 2003 and it is this date that triggers the three-month period for the issuance of this determination.

ISSUE

Whether petitioner was a responsible person of Le Gamin, Inc. for the period March 1, 1998 through May 31, 2000 and, as such, was personally liable, in accordance with Tax Law §§ 1131(1) and 1133(a), for payment of the taxes, penalties and interest due from said corporation.

FINDINGS OF FACT

1. On February 26, 1996, Le Gamin, Inc. (“the corporation”) was formed and incorporated in the State of New York for the purpose of operating a restaurant at 470 West 23rd Street, New York, New York under the trade name “Le Solex.” At the time the corporation was created, Robert Arbor was named president and Declan Redfern became its secretary. Robert Arbor, Robert’s spouse, petitioner Tam Tran Arbor, and Declan Redfern were the sole shareholders and directors of the corporation. Effective April 30, 1998, Declan Redfern resigned as secretary and petitioner was immediately thereafter appointed to fill this position.

2. There is no dispute in the instant matter that the corporation failed to remit sales and use taxes due for the period March 1, 1998 through May 31, 2000. On October 10, 2000, the Division of Taxation (“Division”) issued nine notices of determination to petitioner asserting that she was personally liable as an officer or responsible person of the corporation for the following amounts, plus penalty and interest:

PERIOD	AMOUNT	REASON
05-31-2000	penalty of \$50.00	Late filed - full paid
02-29-2000	\$7,738.50	Failure to file
11-30-1999	\$7,738.50	Failure to file
08-31-1999	\$5,492.44	Timely filed - no remit
05-31-1999	\$6,628.55	Late filed - no remit
02-28-1999	\$7,738.50	Late filed - no remit
11-30-1998	\$5,777.64	Late filed - no remit
08-31-1998	\$7,231.53	Late filed - no remit
05-31-1998	\$10,093.77	Timely filed - part paid

3. To support that petitioner was a responsible officer/person of the corporation, the Division submitted in evidence two documents, the 1998 New York S Corporation Franchise Tax Return of Le Gamin, Inc. and the 1999 Resident Income Tax Return of Robert Arbor and Tam Tran Arbor. The 1998 franchise tax return was signed by Robert Arbor as president and it reported that he owned 50% of the stock, while petitioner and Declan Redfern each held 25% of the outstanding stock. Schedule K-1 appended to the 1998 franchise tax return indicated that petitioner's share of the corporation's ordinary income amounted to \$5,742.00.

The 1999 personal income tax return of petitioner and Robert Arbor reflected that petitioner received wages of \$14,280.00 from the corporation, while Robert Arbor's wage income totaled \$23,500.00. The return also reported petitioner's share of the corporation's ordinary loss for 1999 to be \$1,618.00 and that Robert Arbor's share of the ordinary loss totaled \$3,235.00.

4. To support that she was not a person required to collect sales tax on behalf of the corporation and was thus not personally liable for payment of said tax, petitioner submitted the affidavits of Robert Arbor, her husband, and Declan Redfern, a longtime friend of the Arbors and also the attorney for the corporation. In his affidavit, Robert Arbor candidly and openly admitted that he was the person responsible for collecting and remitting the sales taxes on behalf of the corporation. Mr. Arbor averred that petitioner was, during the period at issue, "a homemaker who has primarily stayed at home to care for our two young children . . ." and that it was never anticipated, nor did she ever, participate in the affairs of the corporation, either from an operational or financial standpoint. Petitioner did not sign tax returns for the corporation, did not have authority to sign checks, did not hire or fire employees and did not determine which creditors to pay. Petitioner received a salary from the corporation for designing menus and

flower arrangements and for some design work in the restaurant. The affidavit of Declan Redfern essentially confirmed the statements made by Robert Arbor in his affidavit.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) provides that “every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article.” As relevant to this proceeding, a person required to collect tax is defined in Tax Law § 1131(1) to include: “any officer, director or employee of a corporation . . . who as such officer, director, employee or manager is under a duty to act for such corporation . . . in complying with any requirement of this article. . . .” Petitioner bears the burden of proving that the particular facts of this matter support her position that she was not a person under a duty to act for the corporation (*see, Matter of McHugh*, 70 AD2d 987; *Matter of Orvis*, Tax Appeals Tribunal, January 14, 1993, *annulled in part* 204 AD2d 916, 612 NYS2d 503, *modified* 86 NY2d 165, 630 NYS2d 680, *cert denied* 516 US 989, 133 L Ed 2d 426).

B. The determination of whether an individual is a person under a duty to act for a business operation is based upon a close examination of the particular facts of the case. In *Matter of Moschetto* (Tax Appeals Tribunal, March 17, 1994), the Tribunal reaffirmed the standard articulated in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990):

The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual’s status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual’s knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual’s economic interest in the corporation.

C. Examination of the entire record in the instant matter leads to the conclusion that petitioner was not a responsible person under a duty to act on the corporation's behalf with respect to the collection and remittance of the sales and use taxes imposed under Articles 28 and 29 of the Tax Law. Although petitioner's status as an officer, director and employee of the corporation and also owner of 25% of its stock might support a determination that she was a responsible person, I have arrived at a contrary conclusion based on other more compelling factors. Specifically, it is noted that petitioner was not involved in making business or financial decisions for the corporation; was not active in its day-to-day operations; did not hire or fire employees; did not sign tax returns; did not determine which creditors to pay and did not have authority to sign checks. Furthermore, petitioner's spouse, Robert Arbor, has admitted being the individual in full and total control over the corporation's operational and financial affairs. In my view these facts outweigh the indicia which would support that petitioner was a responsible person of the corporation.

D. The petition of Tam Tran Arbor is granted and the nine notices of determination dated October 10, 2000 are hereby canceled in full.

DATED: Troy, New York
October 16, 2003

/s/ Brian L. Friedman
PRESIDING OFFICER